IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 72-5175

UNITED STATES OF AMERICA Ex. Rel., KARL MEYER,

Petitioner

vs.

DANIEL WEIL, EXECUTIVE DIRECTOR, Cook County House of Correction, and RICHARD ELROD, SHERIFF OF COOK COUNTY,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

QUESTION PRESENTED

Whether habeas corpus jurisdiction exists for one convicted of a fine-only offense, who has been free on bond since his conviction, and who may possibly never actually be incarcerated.

STATEMENT OF THE CASE

Petitioner Karl Meyer is appealing from the United States Court of Appeals' affirmance of a denial of habeas corpus relief. The United States District Court for the Northern District of Illinois had refused to grant a Writ of Habeas Corpus on December 18, 1970. The United States Court of Appeals for the Seventh Circuit refused to reverse the judgment on March 28, 1972, and denied a petition for rehearing on May 3, 1972.

On the evening of July 14, 1967, the petitioner and associates conducted a "Viet Nam Forum" on a public sidewalk in a busy and highly congested section of the city of Chicago. A series of prior "Forums" had been conducted without either violent incidents or police interruption. However, on July 14 violence occurred with further and increased violence threatened. Consequently, the entire gathering was ordered to disperse by the police. Petitioner dramatically refused to obey the command and was arrested.

The Circuit Court of Cook County, Municipal Division, found the petitioner guilty and fined him $100 on a charge of interfering with a police officer in violation of the Municipal Code of Chicago, Section 11-33, which contains no provision for incarceration. Petitioner has been at large at all times since his conviction on a $1,000 bond, which required an actual cash deposit of $100, an amount equal to the fine. The Supreme Court of Illinois affirmed the conviction [*Chicago* v. *Meyer*, 44 Ill. 2d 1 (1969)], and the United States Supreme Court denied certiorari [*Meyer* v. *Chicago*, 397 U.S. 1024, 90 S. Ct. 1262, *rehearing denied*, 398 U.S. 915, 90 S. Ct. 1688 (1970)].

The Court of Appeals [*United States ex rel. Meyer* v. *Weil*, 458 F. 2d 1068 (1972)], in affirming the denial of habeas corpus relief, noted that: "[a]ppellant has spent no time in custody as a result of his conviction", and stressed that:

> ". . . he was at large on bail when he sought habeas corpus. He is still at large. He was not then and is not now in custody."

The Court summarized: "It is highly speculative whether appellant will serve time because of this conviction."

ARGUMENT

I.

PETITIONER IS NOT ENTITLED TO HABEAS CORPUS RELIEF.

A.

The Relief Sought Is Premature.

There is no indication that Karl Meyer, petitioner, has ever spent a day physically restrained as a result of his conviction in this cause. It is purely speculative whether he will ever sustain physical restraint as a result of this conviction.

Petitioner was fined $100 for interfering with a police officer. The ordinance he violated only provides for monetary penalties and contains no provision for incarceration. Upon a failure to pay the fine, the Circuit Court ordered that the petitioner would have to "work-off" the fine in the House of Correction at a rate of $5 a day. Petitioner has issued no claim of inability to pay the fine. If he were indigent, of course, no incarceration could result from failure to pay. *Tate* v. *Short,* ——U.S.——, 28 L. Ed 2d 130 (1971). Nor has petitioner claimed to have actually spent any amount of time in custody for nonpayment of the fine. At the time when petitioner filed for a Writ of Habeas Corpus he was not then in jail, but rather was free on $1,000 bond (requiring an actual cash deposit of $100 — a sum equal to his fine).

The 1970 Illinois Constitution provides that ". . . No person shall be imprisoned for failure to pay a fine in a criminal case unless he has been afforded adequate time to make payment, in installments if necessary, and has

willfully failed to make payment." Art. I, Sec. 14. Hence, Illinois has constitutionally mandated the collection of fines, rather than "work-out" arrangements.[1]

While recent United States Supreme Court cases have resulted in a restatement of the role of Habeas Corpus, no decision has ever suggested that a person whose sentence is purely speculative is qualified to secure such a Writ. The custody requirement of 28 U.S.C. 2241 has never been so diluted as to be satisfied by the circumstances of the instant case. Section 2241 (c) (3) of Title 28 provides in pertinent part: "The writ of habeas corpus shall not extend to a prisoner unless . . . he is in custody in violation of the Constitution or laws or treaties of the United States."

Carafas v. *LaVallee,* 391 U.S. 234 (1968), recognized that the continuing effects of conviction after release from imprisonment prevented mootness. *Peyton* v. *Rowe,* 391 U.S. 54 (1968), accorded a justifiable interest to those serving consecutive sentences who wished to challenge the legality of the future term. In both cases, the sentences were certain. In *Carafas,* it had been served. In *Peyton,* it was definitely going to be served and visibly affected the sentence then currently being served. The "sentence" imagined in the case at bar represents no such corresponding certitude. Since the simple payment of the fine forecloses imprisonment and inability to pay the fine forecloses imprisonment, it seems questionable whether any imprisonment will be served. No matter how liberally one

---

[1]The effect of the new constitution upon methods of collecting fines has never been presented to a State court for litigation by the petitioner. State remedies are still available (e.g., State habeas corpus, or a Writ of Mandamus or Prohibition) and have not been exhausted here.

defines "custody", there is always the underlying certainty of imprisonment — served or to be served. That certainty is totally absent from the present case.

The abandonment of technical notions of mootness should not blur the real and persisting "in custody" limitation. It is one thing to say, as the Supreme Court did in *Carafas,* that once federal jurisdiction attaches, it is not dissolved by the expiration of the allegedly unlawful confinement, or in *Peyton,* that a second consecutive sentence awaiting service can be questioned prior to its commencement. But where does federal jurisdiction attach when, as here, the custody has yet to occur and is likely never to occur? Our petitioner has never been incarcerated as was the petitioner in *Peyton,* and most certainly has not served a sentence as did the petitioner in *Carafas.* Most telling is the fact that our petitioner was not incarcerated when his petition for habeas corpus was filed.

The majority rule is that "custody" requisites are not satisfied by one at large on bail pending commencement of sentence. The relatively minor restrictions imposed by conditions of bail do not constitute "custody" for the purposes of habeas corpus, unless that term is virtually read out of the statute. *Allen* v. *United States,* 349 F. 2d 362, 363 (1st Cir. 1965). *Matysek* v. *United States,* 339 F. 2d 389, 394 (9th Cir. 1964). Also see: *United States* v. *Meyer,* 417 F. 2d 1020 (8th Cir. 1969), fn. 2; *United States ex rel. Di Rienzo* v. *New Jersey,* 423 F. 2d 224, 229 (3rd Cir. 1970), concurring opinion.

The restrictions enforced by a parole board in *Jones* v. *Cunningham,* 371 U.S. 236 (1963), including detailed regulation of petitioner's economic, social, and moral life do not even approximate the situation confronted in bail. Essentially the only restriction imposed upon an indi-

vidual on bail is to be subject to the court's call upon reasonable notice. *Allen* v. *United States,* 349 F. 2d at 363. This is similar to a subpoena and it cannot be seriously contended that one served with a subpoena with its resulting legal obligation to appear in court is in constructive custody for purposes of Habeas Corpus. *Matysek* v. *United States,* 339 F. 2d at 394.

The last explicit statement by the United States Supreme Court in this matter precisely rejects the grant of jurisdiction under circumstances similar to those of the instant case. Simply put, habeas corpus is not available to one enlarged on bail. *Stallings* v. *Splain,* 253 U.S. 339, 343 (1920). *Wales* v. *Whitney,* 114 U.S. 564 (1885), approvingly cited a State Court case denying habeas corpus relief to one on bail.

Those minority decisions permitting bail to serve as a sufficient restraint for the writ of habeas corpus have done so only when the underlying incarceration was an inevitable event. For example, the case of *Burris* v. *Ryan,* 397 F. 2d 553, 554 (7th Cir. 1968), held that a person free on bail was entitled to habeas corpus relief. It should be noted, however, that there petitioner's motion for a continuation of bail as well as his petition for the Great Writ were denied by the district court. Therefore, having lost bail, the petitioner faced the immediate and definite prospect of incarceration. This same circuit has also reached the conclusion that one released upon the giving of bond did not meet the restraint requirements of Habeas Corpus. *United States ex rel. Walmer* v. *Tittemore,* 61 F. 2d 909 (7th Cir. 1932). See *Rowland* v. *Arkansas,* 179 F. 2d 709 (8th Cir. 1950).

Therefore, bail has been seen as a sufficient restraint only where serving the underlying sentence was inevitable.

That inevitability is nowhere extant in the present case. At this point in the proceedings, the certainty of sentence can only be a product of petitioner's imagination.[2]

Similarly, if jailing awaiting trial was automatically sufficient to satisfy the grounds for habeas corpus relief, virtually everyone arrested for a crime would come within the provisions of habeas corpus. However, Section 2254 applies to "a person in custody pursuant to the judgment of a State court". Mere arrest does not amount to a judgment of a State court. The petitioner in the instant case was arrested during the closing hours of July 14, 1967. He obtained his release shortly after noon on July 15, 1967, after posting bail. This brief period of custody pursuant to arrest is insufficient to warrant habeas corpus relief. If it were otherwise, there would be no need for courts to consider whether bail satisfies the requirements of custody.

The foregoing demonstrates that there exists no conflict between the decision in the instant case and any decisions of other federal courts, including the United States Supreme Court. The facts of this particular case fully support the determination reached by the United States Court of Appeals for the Seventh Circuit, and in no way oppose existing case law.

---

[2] The respondents also raised this issue of jurisdiction at the District Court level. "Mr. Patner [petitioner's attorney]: Your Honor, you are dismissing then on the merits, I take it, because the State raised the question of whether habeas corpus was the proper relief *and we did not respond to that. . . .*" Proceedings before the District Court, December 18, 1970.

B.

Incarceration Would Be Voluntary.

Incarceration in the case at bar can only occur if the petitioner freely and voluntarily chooses it. If he is unable to pay the fine, imprisonment cannot be imposed to satisfy the monetary penalty. *Tate* v. *Short*, ——U.S.——, 28 L. Ed. 2d 130 (1971). *Williams* v. *Illinois*, 399 U.S. 235 (1970). *Tate* held that where a statute provides for fines only (the situation in the present case), the fine cannot be converted into a prison term for an indigent defendant.

Given the force of that holding, it must follow that any jailing in the instant case will result from a volunteered refusal to pay. "We emphasize that our holding does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so." *Tate* v. *Short*, 28 L. Ed. 2d at 134. In this manner, the *Tate* case provides the real key to an understanding of petitioner's maneuverings. He has challenged the ordinance in the Supreme Court of Illinois and was unsuccessful. He also failed to obtain United States Supreme Court review of the matter. Now, through the device of Habeas Corpus, petitioner seeks a second series of reviews of that same ordinance. There has been no showing that petitioner is unable to pay the fine. Indeed, his actual bond deposit is a sum equal to the amount of the fine.

What is sought by petitioner is not a release from any onerous restraint, but rather another ruling on the legality of the Chicago ordinance. The purposes of habeas corpus have been subverted, for the relief sought is wholly unrelated to custody. He holds up solely the "choice" of incarceration to gain review. If that review again proves

to be unbeneficial, he can then pay the fine. Never having served a day in jail, he instantaneously ends any claimed federal jurisdiction. A Habeas Corpus action is not an appropriate vehicle for securing a declaratory judgment.

The restraint here, if and when it occurs, must be considered voluntary because it is unnecessary. Submission to custody will be for the mere purpose of procuring the determination of certain legal questions lacking any relationship to procuring release from an irksome restraint. Under these facts, any surrender will be ineffective to obtain federal consideration. *Baker* v. *Grice,* 169 U.S. 284, 293-4 (1898).

In the final analysis the fact that over five years have passed since petitioner's conviction without his being incarcerated best demonstrates the nature of the instant case. Those five years give substance to the Seventh Circuit's observation that "It is highly speculative whether appellant will ever serve time because of this conviction." Speculative custody is not custody. Nor should speculation serve as the basis for obtaining jurisdiction to attack for a second time a municipal ordinance.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

EDWARD V. HANRAHAN,
State's Attorney of Cook County, Illinois,
500 Chicago Civic Center,
Chicago, Illinois 60602,

Attorney for Respondents.

ELMER C. KISSANE,
WILLIAM K. HEDRICK,
Assistant State's Attorney,
Of Counsel.